In the Matter of Merchant Mariner's Document No. Z-817522 and all other Seaman Documents
Issued to: PABLO V. IRIZARRY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1426

PABLO V. IRIZARRY

This appeal has been taken in accordance with Title 46 Code of Federal Regulations 137.25-15.

By order dated 4 October 1962, an Examiner of the United States Coast Guard at New York, New York suspended Appellant's seaman documents for two months outright plus four months on twelve months' probation upon finding him guilty of misconduct. The two specifications found proved allege that while serving as second assistant steward on board the United States SS ARGENTINA under authority of the document above described, on 3 August 1962, Appellant assaulted and battered crew member Raul Rodriguez and failed to obey a lawful order of the Second Mate.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specifications. As witnesses for the Government, Rodriguez and Losada testified that, after an argument, Appellant struck Rodriguez in the face with his fist. Appellant and his witness, Garcia, testified that Rodriguez was the guilty party because he initiated the physical contact when he butted Appellant with his head. On the basis of this direct conflict in the testimony of the witnesses for the opposing parties, the Examiner resolved the question of credibility against Appellant and concluded that he was guilty of assault and battery. The Examiner's decision of 4 October 1962 was served on counsel for Appellant on 5 October.

On 29 October, counsel filed a petition to reopen the hearing to admit newly discovered evidence. It is claimed that: the testimony of Rodriguez and Losada was concocted to protect Rodriguez from being charged with assault; the newly discovered evidence consists of evidence by crew member Fernandez that Rodriguez butted Appellant as stated by the latter and Garcia in their testimony at the hearing; this evidence was not known to Appellant until 22 October when he saw Fernandez and was told that he saw this happen but did not say so before because Rodriguez and Losada had threatened him with bodily harm if he testified for Appellant and they also told Fernandez that Appellant would be

cleared of the assault and battery charge. These statements are supported by an affidavit by Fernandez which was submitted with the petition to reopen the hearing.

On 21 November, the Examiner denied the petition after hearing oral argument by both parties. The Examiner concluded that testimony by Fernandez would only be cumulative evidence in support of the testimony given by Appellant and Garcia which had been rejected by the Examiner as a matter within his authority to determine questions of credibility. The Examiner also pointed out that Fernandez, according to his affidavit, refused to help Appellant when the latter requested Fernandez, prior to the hearing, to be a witness for Appellant. From this, the Examiner concludes that Appellant knew Fernandez was a witness to the incident and, therefore, he could have been subpoenaed to appear at the hearing. For these reasons, the Examiner decided that the evidence proposed to be given by Fernandez was not newly discovered evidence.

On 3 December, counsel filed a notice of appeal from the Examiner's decision of 4 October and from his denial of the petition to reopen the hearing. Counsel contends that, in view of the matter contained in the affidavit of Fernandez, the denial of the petition was inequitable and unjust. It is requested that the findings and order be vacated or that the hearing be reopened to admit testimony by Fernandez.

APPEARANCE FOR APPELLANT: Klein and Hirschberger of New York City, by Nathaniel A. Rankow, Esquire, of Counsel.

OPINION

The notice of appeal is acceptable as a timely appeal from the Examiner's denial of the petition to reopen the hearing but it is not acceptable as an appeal from the Examiner's decision of 4 October since the appeal was not filed within the statutory limit of thirty days from the effective date of the decision (5 October). Assuming that the running of the time for appeal was tolled between the date the petition to reopen was filed (29 October) and when it was denied (21 November), the notice of appeal, filed on 3 December, was submitted thirty-six days after the effective date of the decision. Therefore, this review will be limited to the issue raised by the petition to reopen the hearing.

In Commandant's Appeal Decision No. 797, the entire record was reviewed since the appeal from the denial of the petition to reopen was within thirty days of the effective date of the Examiner's original decision (as distinguished from his decision denying the

petition to reopen).

I agree with the Examiner's denial of the petition to reopen the hearing. Testimony by Fernandez would not be in the category of newly discovered evidence because of its cumulative nature and also because Appellant or his counsel could have obtained a subpoena requiring Fernandez to appear as a witness at the hearing. Nevertheless, there is no indication that Fernandez was even questioned by Appellant or his counsel, prior to the hearing, in order to determine what he probably would have said if he had been called as a witness. The regulations require that a petition to reopen contain a statement of "reasons why the petitioner, with due diligence, could not have discovered such new evidence prior to the date the hearing was completed" (46 CFR 137.25-5(b)(4)) and that the petition shall be granted only "when valid explanation is given for the failure to produce this evidence at the hearing" (46 CFR 137.25-10(b)). Counsel's petition to reopen does not contain such information relative to the failure of Fernandez to appear as a witness even though there was a month and a half between the time Appellant was charged and the service of the Examiner's decision on 5 October. Whether the good regulations, published on 5 October 1962, are considered to be applicable to this case is immaterial since substantially the same meaning is contained in Commandant's Appeal Decisions No. 797.

In addition to the above reasons for upholding the denial of the petition to reopen the hearing, there is a definite conflict between Appellant's testimony and the affidavit of Fernandez. When Appellant was asked whether anyone else was in the area of the alleged offense, he replied, "No, just Garcia was standing by outside by the pantry close to the door and nobody else was there at that time" (R. 141). On the other hand, the affidavit of Fernandez states that he was only about two feet away from Appellant when the incident occurred and, before the hearing, Appellant told Fernandez that he was wanted to appear at the hearing as a witness for Appellant. This completely disagrees with Appellant's clear statement that nobody except Garcia was in the area at that time.

If the affidavit is correct in stating that Fernandez was present and Appellant knew this, then Appellant's testimony that nobody else except Garcia was there indicates that Appellant did not want the version of Fernandez presented at the hearing. This concealment by Appellant casts reflection on the later statements in the affidavit which are favorable to Appellant's side of the merits of the case. If Fernandez was not there, then testimony similar to the statements if the affidavit would be worthless. Considered from the either approach, there is no reason to believe that the result would be different of the testimony of Fernandez

were in the record.

ORDER

The order of the Examiner dated at New York, New York, on 4 October 1962, is AFFIRMED.

E. J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 11th day of October, 1963.